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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN MICHAEL SUGGS,

Defendant and Appellant.

E064364

(Super.Ct.No. FVI017094)

OPINION

APPEAL from the Superior Court of San Bernardino County. Raymond L. Haight
III, Judge. Affirmed.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Karl T. Terp,
Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL HISTORY

On November 4, 2014, the voters approved Proposition 47, The Safe Neighborhoods and Schools Act (Proposition 47); it went into effect the following day. Proposition 47 reduced certain nonserious, nonviolent felonies to misdemeanors. It added and amended sections of the Penal Code. Penal Code section 1170.18 was added and provides that a person currently serving a sentence for a felony conviction, whether by trial or plea, who would have been guilty only of a misdemeanor had Proposition 47 been in effect at the time the plea was entered, or at the time of trial, may petition for a recall of the sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing.

On June 17, 2003, prior to the passage of Proposition 47, defendant and appellant Jonathan Michael Suggs entered a guilty plea to unlawfully driving or taking a vehicle, a 1988 Ford Bronco, without the owner's permission under Vehicle Code section 10851, subdivision (a). In exchange for the plea, defendant received a stipulated sentence of two years to be served concurrent to, "any other time obligated to serve." The trial court dismissed all remaining counts and the prior conviction allegations.

On July 6, 2015, defendant filed a petition to recall his sentence (Petition) stating that his felony conviction should be reduced to a misdemeanor. On July 17, 2015, the trial court denied the petition on the ground that defendant did "not satisfy the criteria in Penal Code [section] 1170.18 and is not eligible for resentencing."

On appeal, defendant contends that Penal Code section 1170.18 should be broadly interpreted to include violations of Vehicle Code section 10851, and be reduced to a misdemeanor.

We affirm the denial of defendant's Petition.

DISCUSSION

Defendant claims that Penal Code section 1170.18 should be interpreted to include Vehicle Code section 10851¹ as a felony that can be reduced to a misdemeanor violation of Penal Code section 490.2. We affirm the denial of defendant's Petition because he failed to meet his burden of alleging facts that he was eligible for resentencing under Penal Code section 490.2.

"The voters approved Proposition 47 at the November 4, 2014 general election, and it became effective the next day." (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328.) "Proposition 47 'was intended to reduce penalties 'for certain nonserious and nonviolent property and drug offenses from wobblers or felonies to misdemeanors.'"" (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 652.) "'In interpreting a voter

¹ Vehicle Code section 10851 provides, "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code or by a fine of not more than five thousand dollars (\$5,000), or by both the fine and imprisonment." This section "'proscribes a wide range of conduct [and may be violated] either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).'" (*People v. Garza* (2005) 35 Cal.4th 866, 876.)

initiative . . . we apply the same principles that govern statutory construction. [Citation.] Thus, “we turn first to the language of the statute, giving the words their ordinary meaning.” [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate’s intent]. [Citation.] When the language is ambiguous, “we refer to other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.” [Citation.]’ [Citation.] In other words, ‘our primary purpose is to ascertain and effectuate the intent of the voters who passed the initiative measure.’” (*People v. Briceno* (2004) 34 Cal.4th 451, 459.)

Proposition 47 added Penal Code section 1170.18 to the Penal Code. Subdivision (a) of Penal Code section 1170.18, provides in pertinent part, “A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section (‘this act’) had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.” Under Penal Code section 1170.18, subdivision (b), the trial court first determines whether the petition has presented a prima facie case for relief under Penal Code section 1170.18, subdivision (a). If the petitioner satisfies the criteria in subdivision (a), then he will be resentenced to a misdemeanor,

unless the court, within its discretion, determines the petitioner would pose an unreasonable risk to public safety. (Pen. Code, § 1170.18, subd. (b).)

Penal Code section 1170.18, subdivision (f) provides: “A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.” Penal Code section 1170.18, subdivision (h) provides: “Unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subsection (f).”

As relevant to this case, Vehicle Code section 10851 is not listed in Penal Code section 1170.18, and the issue of whether a defendant is eligible for resentencing for a violation of that section is currently under review in the California Supreme Court in *People v. Page* (2015) 241 Cal.App.4th 14, review granted, January 27, 2016, S230793. We only briefly address the possibility that a violation of Vehicle Code section 10851 could be reduced to a misdemeanor under Proposition 47.

Section 490.2 was added to the Penal Code. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Penal Code section 490.2 provides in pertinent part, “Notwithstanding [Penal Code s]ection 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor.” Penal Code section 487,

subdivision (a), provides that if the value of the money, labor, real or personal property taken exceeds \$950, the offense is a felony. Penal Code section 487, subdivision (d)(1), provides that grand theft occurs if the property is an automobile, regardless of the value.

Penal Code section 1170.18 clearly states that a defendant must show he was convicted of a felony but would have been convicted of a misdemeanor if Proposition 47 had been in effect at the time of the offense. For an offense under Penal Code section 490.2, which was added to the Penal Code, defendant had to allege facts in the Petition that he would have been guilty of a misdemeanor violation of Penal Code section 490.2 rather than the felony conviction. It is true that Vehicle Code section 10851 is not listed in Penal Code section 1170.18. However, Vehicle Code section 10851 can be violated by the taking of a vehicle with the intent to permanently deprive the owner of the vehicle. Assuming that a defendant takes a vehicle valued under \$950, such violation could constitute a violation of Penal Code section 490.2.

However, in this case, defendant failed to prove that the value of the vehicle in this case was under \$950, or to allege any facts to support that he was eligible for resentencing. In his reply brief, defendant “acknowledges that he has not provided evidence from the record to demonstrate that the value of the vehicle was less than \$950.00.” The petitioner has the burden of establishing eligibility for relief under Penal Code section 1170.18. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880 (*Sherow*).)

In *Sherow*, the defendant was ultimately convicted of five counts of second degree burglary, and filed a petition to recall his sentence, which was denied. As set forth in the

opinion, “[The defendant] appeals challenging only the decision as to counts 1 and 2. He contends the record does not show the loss as to each count exceeded \$950 and thus the two counts should be resentenced as misdemeanors. [The defendant]’s petition sought resentencing as to all five counts without any separate discussion of the counts, no reference to facts or evidence and no argument.” (*Sherow, supra*, 239 Cal.App.4th at p. 877.) The People responded that the defendant had failed to meet his burden under Penal Code section 1170.18 to show the losses did not exceed \$950. (*Sherow*, at p. 877.) The defendant, in turn, argued that his “blanket request” to reduce his convictions to misdemeanors, without any discussion or elaboration, placed the burden on the prosecution to discern whether he was eligible for relief under Proposition 47. (*Id.* at p. 878.)

The *Sherow* court observed that, “Proposition 47 does not explicitly allocate a burden of proof.” (*Sherow, supra*, 239 Cal.App.4th at p. 878.) The court stated that “applying established principles of statutory construction I believe a petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing. In such cases, it is important to keep in mind a person . . . was validly convicted under the law applicable at the time of the trial of the felony offenses. It is a rational allocation of burdens if the petitioner in such cases bear[s] the burden of showing that he or she is eligible for resentencing of what was an otherwise valid sentence.” (*Id.* at p. 878.)

The *Sherow* court also referred to background information prepared by “Judge J. Richard Couzens and Presiding Justice Tricia A. Bigelow” on Proposition 47, which

provided, ““The petitioner will have the initial burden of establishing eligibility for resentencing under section 1170.18(a): i.e., whether the petitioner is currently serving a felony sentence for a crime that would have been a misdemeanor had Proposition 47 been in effect at the time the crime was committed. If the crime under consideration is a theft offense under sections 459.5, 473, 476a, 490.2 or 496, the petitioner will have the initial burden of proving the value of the property did not exceed \$950.”” (*Sherow, supra*, 239 Cal.App.4th. at p. 879.)

The *Sherow* court determined that the defendant’s petition, which gave “virtually no information” regarding his eligibility for resentencing, was properly denied. It further noted that “[a] proper petition could certainly contain at least [the defendant’s] testimony about the nature of the items taken. If he made the initial showing the court can take such action as appropriate to grant the petition or permit further factual determination.” (*Sherow, supra*, 239 Cal.App.4th at p. 880; accord *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449 [“Under *Sherow* [the defendant] had the burden to establish ‘the facts, upon which his . . . eligibility [was] based[,]’ i.e. that the value of the property he took from the store did not exceed \$950”].)

Here, defendant’s Petition only stated that he had been convicted of violating Vehicle Code section 10851. No further facts regarding his eligibility for resentencing were provided. Defendant did not allege that although Vehicle Code section 10851 is not listed in Proposition 47, he was otherwise eligible because his offense constituted a theft offense under Penal Code section 490.2. Based on the foregoing, defendant was not

entitled to resentencing under Penal Code section 1170.18 because he did not meet his burden of showing he was eligible for resentencing under Proposition 47.

DISPOSITION

The trial court's order denying defendant's petition to recall his sentence is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.